

GS

LAW OFFICE OF DONALD B. MOONEY

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June 24, 2016

**VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED**

Roland Sanford
General Manager
Solano County Water Agency
810 Vaca Valley Parkway #203
Vacaville, CA 95688

Colonel David G. Ray, District Commander
Sacramento District
U. S. Army Corps of Engineers,
1325 J Street
Sacramento, CA 95814-2922

Gina McCarthy, Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Thomas Howard, Executive Director
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Jared Blumenfeld, Regional Administrator
US EPA, Pacific Southwest, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Pamela C. Creedon, Executive Officer
Central Valley Regional Water
Quality Control Board
11020 Sun Center Drive, Suite 200
Rancho Cordova, CA 95670-6114

***Re: 60 Day Notice of Intent: Winters Putah Creek Nature Park Channel
Realignment (SPK-2011-00371)***

To Whom It May Concern:

On behalf of the Winters Friends of Putah Creek ("WFPC") and other interested parties, I am writing to provide notice of WFPC's intent to sue the Solano County Water Agency for its violation of section 404 of the Clean Water Act, 33 U.S.C. § 1311. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. The reasons for this notice are set out in greater detail below.

At the March meeting of the Lower Putah Creek Coordinating Committee, SCWA announced that it intended to proceed with Phase 3 of the Winters Putah Creek Nature Park Channel Realignment (Project). Continuing the Project, particularly Phase 3 will result in irreparable harm to the environment and violates the Clean Water Act (CWA), 33 U.S.C., § 1311.

I. VIOLATIONS OF THE FEDEAL CLEAN WATER ACT

A. SCWA FAILED TO MEET THE WETLAND MITIGATION REQUIREMENTS IN PHASES 1 AND 2

Phases 1 and 2 of this Project allowed for the filling of 14.32 acres of waters of the United States, subject to a mitigation requirement for creation of 18.4 acres of riparian wetlands, emergent wetlands and open water. (See Permit SPK-2011-00371, Special Condition 1 (September 12, 2011). In implementing Phase 1 and 2, SCWA failed to create the new wetlands. The floodplains, where the wetlands could have been created, were instead constructed as a planar surface sloping at 1 to 2 percent to the channel, draining water away rapidly, holding no water, and supporting no wetlands. Thus, there are no areas in Phase 1 and 2 that meet the wetland definition for wetland hydrology, soils, and plants.

B. WETLAND MITIGATION WILL UNAVOIDABLY BE UNMET IN PHASE 3

Phase 3 is designed to fill 1.8 acres of waters of the United States. The permit, however, requires that Phase 3 mitigate for the loss by the creation of 2.4 acres of new channel and active floodplain. (Permit SPK-2011-00371 (August 12, 2014).) The Project design does not include 2.4 acres of new channel or floodplain. As designed, Phase 3 fails to meet the mandatory mitigation requirements.

C. DIRTY FILL USED IN PHASE 3

SCWA placed dirty fill in the Phase 3 Project area during February and March 2016. Jeff TenPas for the WFPC notified the Army Corps of Engineers of the unlawful fill in the Phase 3 Project area. (Attachment A: Email dated February 15, 2016 from Jeff Tenpas to William H. Guthrie, with photos attached; and Attachment B: Email dated March 30, 2016, from Jeff TenPas to Carol Scianna and William H. Guthrie with photos attached.) Although the permit for Phase 3 requires the use of "only clean and nontoxic fill material", SCWA and its contractors used fill material that contains debris in the form of shreds of black plastic.

D. VIOLATION OF CONDITIONS FOR NATIONWIDE PERMIT NUMBER 27

Nationwide Permit (NWP) 27 is restricted from allowing the conversion of open channel stream habitat to another aquatic habitat type. In Phases 1 and 2, SCWA reduced the open channel area by 14.32 acres. Under NWP 27, the only allowable mitigation was in the form of at least 14.32 acres of open channel. In direct contravention of the terms of NWP 27, SCWA's Section 404 permit (SPK-2011-00371, Sept 12, 2011) allowed mitigation to be in the form of "seasonally flooded riparian wetlands, emergent wetlands, and open water channel". In Phase 3, there is a proposed loss of 1.8 acres of waters of the United States, which is the result of narrowing the stream channel, and the permit allowed mitigation to be in the form of "new channel or active floodplain." (Permit SPK-2011-00371 (August 12, 2014).) Again, NWP 27 allows only for direct replacement of open channel with open channel.

E. VIOLATION OF NATIONWIDE PERMIT GENERAL CONDITION 6 - SUITABLE MATERIAL.

General Condition 6 requires that “no activity may use unsuitable material” as fill. In contradiction to General Condition 6, SWCA and its contractor used fill in Phases 1 and 2 (and proposed in Phase 3) that was a heavy clayey material, low in nutrients, and organic matter. The fill is too high in clay, too compacted, and has such low permeability that it does not allow water to move through it. Material of this texture is not normally found in a floodplain soil, and it is not suitable material for floodplain fill. Because the fill was used to narrow the channel, it essentially lines the channel, and cuts off the stream from the floodplain and the groundwater. Three highly detrimental effects result for the use of this bad fill: 1) water flow from the stream to the riparian forest has been cut off, as evidenced by the mature trees on the floodplain that are dying for lack of water; 2) the hyporheic zone, the ecosystem zone where stream and groundwater meet, has been eliminated along with the ecosystem services and aquatic life that occupy that zone; and 3) the movement of water from the stream and into groundwater has been impaired, probably severely. Using this material results in a failure to maintain a “critical characteristic” of the streambed, stream banks, and floodplain of the fill site. (See 40 C.F.R. §230.5(f)).

F. FILL IN VIOLATION OF 33 U.S.C. SECTION 408.

Fill has been placed in Phase 3 without the authorization required by 33 U.S.C. section 408. This violation of section 408 has been documented and reported to the Army Corps on at least two occasions. (See Attachments A and B.)

II. RELIEF SOUGHT

Pursuant to Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), and the Adjustment of Civil Monetary Penalties for Inflation, 40 C.F.R. §19.4, each separate violation of the Clean Water Act subjects the violator to a penalty for all violations occurring during the period commencing five years prior to the date upon which WFPC serve their notice of intent to file suit. These provisions of law authorize civil penalties of up to \$32,500 per day per violation for all Clean Water Act violations.

In addition to civil penalties, WFPC will seek injunctive relief preventing further violations of the Clean Water Act, 33 U.S.C. §1365(a) and (d), declaratory relief, and such other relief as permitted by law. Lastly, the CWA, 33 U.S.C. § 1365(d), permits prevailing parties to recover costs, including attorney’s fees and expert’s fees associated with this enforcement action.

Mr. Roland Sanford
Colonel David G. Ray
June 24, 2016
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III. PARTY GIVING NOTICE

Winters Friends of Putah Creek
c/o Donald B. Mooney
Law Office of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616

IV. CONCLUSION


Upon expiration of the 60-day notice period, WFPC intend to file a citizen suit under the Clean Water Act for the above-referenced violations, and for any similar violations that occur after the date of this notice letter.

During the 60-day notice period, however, WFPC are willing to discuss effective remedies for the violations noted in this letter, and actions that might be taken to ensure future compliance with the Clean Water Act. Moreover, the 60-day notice period would be the appropriate time for SCWA to inform WFPC and the Army Corps of Engineers of any steps they have already taken to remedy the violations discussed in this notice. If any party named in this 60-day notice wishes to pursue such discussions in the absence of litigation, it is suggested that such party initiate those discussions immediately. If good faith negotiations are not occurring, at the close of the 60-day notice period WFPC will move forward expeditiously with litigation.

Counsel representing WFPC in this matter is listed below. Please direct all communications to WFPC at:

Donald B. Mooney
Law Office of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616
530-758-2377
530-304-2424
dbmooney@dcn.org

Sincerely,


Donald B. Mooney
Attorney for Winters
Friends of Putah Creek

Attachments

cc: Jeff TenPas

ATTACHMENT A

ATTACHMENT A

Subject: Fill occurring, Friday Feb 12, 2016, on Putah Creek, Phase 3

Date: Monday, February 15, 2016 at 8:32 PM

From: Jeff TenPas <jtenpas@lycos.com>

To: "William.H Guthrie" <William.H.Guthrie@usace.army.mil>, "Marc.A Fugler" <Marc.A.Fugler@usace.army.mil>, "Wellman-Barbree, Ilene@DWR" <Ilene.Wellman-Barbree@water.ca.gov>

Cc: Donald Mooney <dbmooney@dcn.org>

To: USACE and CVFPB

Re: Fill occurring in Winters - presumably without 408 permit, or CVFPB permit

Hello All, on Wednesday or Thursday last week I saw a lot of fill was being brought into the Putah Creek Realignment Project - Phase 3 - in the area currently under consideration for a 408 permit and CVFPB permit. There were dump truck loads of soil stacked row upon row across a large area.

I checked into this on Friday to see what was happening. Most of the fill had already been leveled across a half acre or more, there were about 15 piles remaining (photo 2496) covering what I estimate was less than 10% of the original area of fill piles. Another concerned person sent me a photo of a dump truck unloading (photo "dumping")

I went to see Disney Construction, the firm currently completing construction of the bridge, and talked to Charles Mason (707 315-1638, cmason@disneyconstruction.com) to find out what was happening. It appeared to me and Charles confirmed that Disney was unloading the fill there. I asked if Disney had permission, and Charles said they had permission from Rich Marovich and Solano County Water Agency to put the fill there. I called the City as the property owner, left a message, and got a message back from Carol Scianna confirming that the City was aware, and had been advised by Rich that the permits were in place to allow this.

I advised Charles Mason for Disney Construction that the permits were to the best of my knowledge not in place to allow this. This was late Friday afternoon, so I called the USACE and left a message.

I would have to estimate over 500 cubic yards of fill, and maybe 1000 to 2000 or more. Disney Construction should know how much.

The fill appears to be in violation of USACE and CVFPB permit requirements. Since this fill has probably not been sampled and tested, it may be just as unsuitable for use in the floodplain as the earlier fill.

On another subject. Downstream in the NAWCA 3 project area, a dozen or more large eucalyptus trees have been cut in the floodplain. The cutting has greatly reduced the overstory and the stream shading in this reach. The trees. The trees were cut in rounds, and the rounds and limbs and tops remain piled in the floodplain.

List of photos:

2496 - Mounds of fill remaining on Friday

2502 - Depth of fill

2504 - Filling wetlands, mounds in background

2507 - Already filled area in the foreground, mounds of fill in background

2522 - Excavator working on Friday

Dumping - Photo from Wednesday showing one dump load

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Please call or email if I can answer any questions, using work number from 7-4.

Sincerely yours,

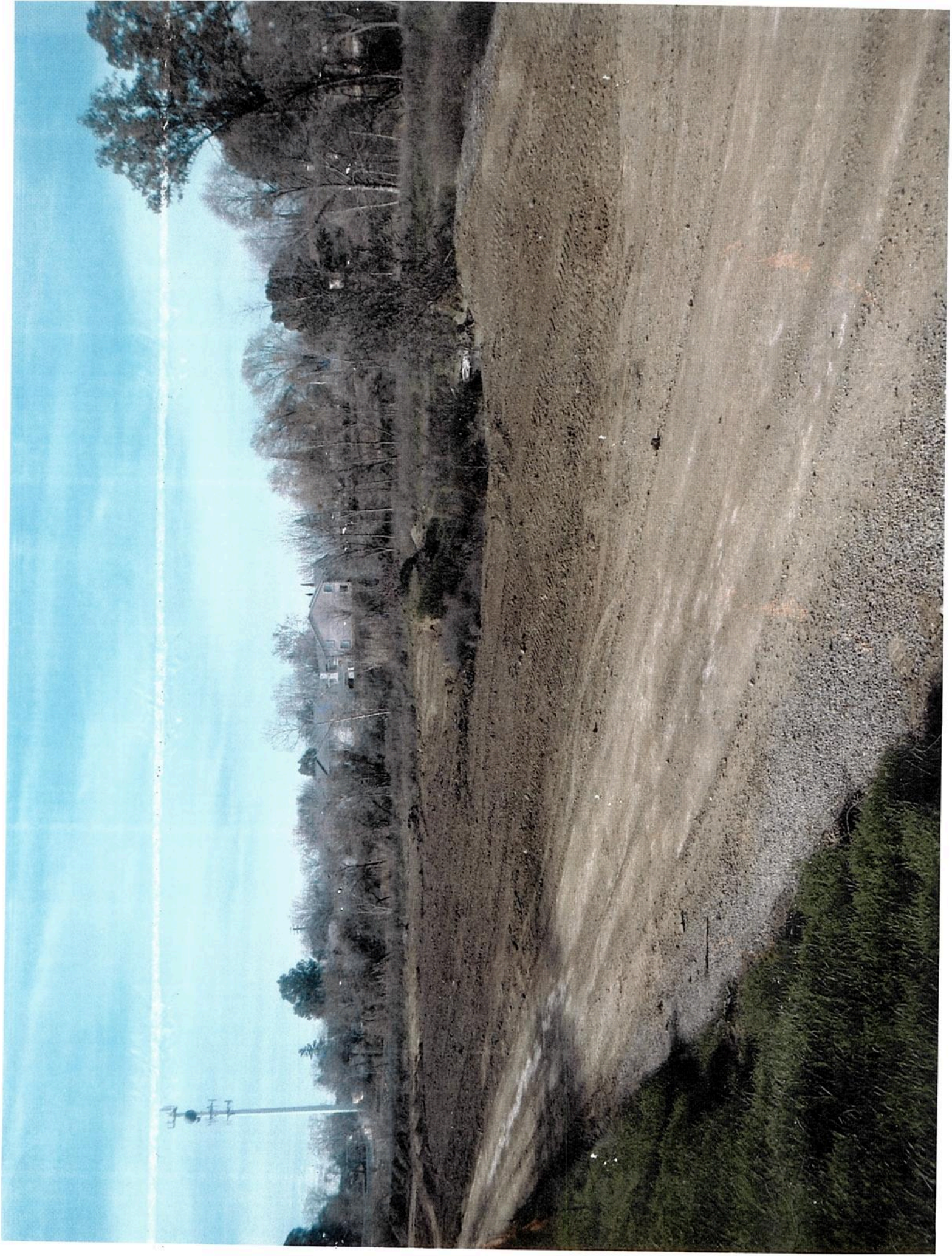
Jeff TenPas
24 East Main St
Winters, CA 95694

530 795-3617 home, 707 562-8955 work













ATTACHMENT B

ATTACHMENT B

Subject: Fill currently going in Phase 3

Date: Wednesday, March 30, 2016 at 1:40 PM

From: Jeff TenPas <jtenpas@lycos.com>

To: Carol Scianna <cosmozz@sbcglobal.net>, <William.H.Guthrie@usace.army.mil>, "Wellman-Barbree, Ilene@DWR" <Ilene.Wellman-Barbree@water.ca.gov>

Hello All, there is new fill going on in Phase 3, and to the best of my knowledge there are no permits from the CVFPB or COE 408 for this. This is similar to the filling that went on last month.

I am wondering what is the story here.

Carol, does the City approve of this?

Is this legal? Where was the fill from? Was the fill tested? Is the fill suitable for the floodplain, sandy and not clayey?

Was the site surveyed for western pond turtle and nests and nesting birds before starting work?

It seems as if filling will be done before permits are in place, presuming that CEQA and NEPA issues and wetland mitigation issues are resolved. If this and last months fill is unsuitable, will it be removed?

See photos attached:

1. New fill
2. Last months fill. The photo shows that fill had trash and debris in it, just the surface layer is showing.

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Winters Friends of Putah Creek
Jeff TenPas, Chair
24 East Main St
Winters, CA 95694





